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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1078

THE BORDEN COMPANY, PETITIONER

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, ET AL., AND CAMPBELL SOUP COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS FREEMAN, ET AL., IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 25a–43a) is reported at 256 F. Supp. 592. The *per curiam* opinion of the court of appeals (Pet. App. 45a) is reported at 369 F. 2d 404.

JURISDICTION

The judgment of the court of appeals (Pet. App. 46a) was entered on December 29, 1966. The petition for a writ of certiorari was filed on February 18, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a regulation of the Department of Agriculture setting minimum standards for poultry meat content in poultry soup products was supported by evidence in the administrative record.

2. Whether the Department of Agriculture had authority to promulgate such a regulation.

3. Whether the Administrative Procedure Act or other applicable procedural rules were violated in the promulgation of the regulation.

4. Whether the district court sustained the regulation on grounds other than those relied on by the Department of Agriculture.

STATUTES INVOLVED

The relevant statutes and regulations appear in Appendix, pp. 11–18, *infra*.

STATEMENT

The Poultry Products Inspection Act ("PPIA"), 21 U.S.C. 451, *et seq.*, confers upon the Secretary of Agriculture exclusive jurisdiction over the marketing of poultry and poultry products [1] moving in interstate commerce. 21 U.S.C. 467. The Act, which also prohibits "false or misleading" labeling of poultry products (21 U.S.C. 457(b), 458(d)), empowers the Secretary to issue rules and regulations necessary to effectuate the purposes of the Act. 21 U.S.C. 463.

Acting under this statutory authority, the Secre-

[1] The term "poultry products" is defined to include "unless exempted by the Secretary, any human food product consisting of any edible part of poultry separately or in combination with other ingredients." 21 U.S.C. 453(e).

tary issued proposed standards governing minimum poultry meat content in certain poultry food products in April 1963 and supplemented these proposed standards with standards relating to other products—including poultry soup—in a notice of proposed rulemaking published in the Federal Register in October 1963. 28 Fed. Reg. 11017. In February 1964, the Secretary published in the Federal Register additional proposals to amend the exemptions of certain poultry products to conform with the rules proposed several months earlier. 29 Fed. Reg. 2892. Upon notice published in the Federal Register (28 Fed. Reg. 14432, 29 Fed. Reg. 530) oral public hearings were held on March 23, 24, and 25, 1964, on the question whether poultry soup products, labeled as such, should be required to contain at least two percent poultry meat. On July 1, 1964, the Secretary issued regulations, to take effect on January 1, 1965, which provided, *inter alia,* that poultry soup mixes labeled as such without qualification (*e.g.,* "chicken soup") would be considered deceptive if they contained less than two percent poultry meat in their ready-to-serve form. 7 C.F.R. 81.134(c)(6)(ii); pp. 16–17, *infra.* The regulations authorized labeling of such a product containing less than two percent poultry meat, "when appropriate," with a qualifying term (*e.g.,* "chicken flavored * * * soup"). *Ibid.*[2]

[2] At the same time, the regulations exempted—under the Secretary's power to issue exemptions for "poultry products" (see note 1, *supra*)—products containing less than two percent poultry meat which are properly labeled and do not "in any respect have a false or misleading label." 7 C.F.R. 81.208(a); pp. 17–18, *infra.*

Petitioner thereupon instituted this action for declaratory and injunctive relief alleging that it manufactures and sells a dehydrated chicken noodle soup mix and a chicken rice soup mix, both of which contain less than the required minimum quantity of chicken meat in their ready-to-serve form. Petitioner contended that the Department of Agriculture did not have the power to promulgate the regulation at issue; that the administrative record failed to contain evidence that use of unqualified labels on poultry soup products containing less than two percent poultry meat was deceptive or misleading; and that there were procedural flaws in the administrative process. The district court rejected these claims, granted respondents' motion for summary judgment and dismissed the complaint (Pet. App. 25a–44a). The court of appeals affirmed *per curiam* on the opinion of the district court (Pet. App. 45a).

ARGUMENT

1. The district court and the court of appeals not only rejected the assertion that the challenged regulations were "arbitrary, capricious, beyond the scope of the Secretary's discretion or otherwise unlawful" (Pet. App. 43a); they also held that the regulations were supported by substantial evidence (Pet. App. 43a, 45a). Petitioner attacks these holdings on the ground that there was insufficient proof in the administrative record that consumers would be deceived by the prohibited unqualified labels. It was a plainly permissible inference, however, from the material presented to the Secretary in the administrative proceedings that the standard prescribed was necessary

to prevent consumer deception. Both the Secretary (Pet. App. 8a–11a) and the district court (Pet. App. 40a–43a) referred to views expressed by representatives of consumer-oriented groups in response to the Secretary's invitation to comment upon the proposed standards. These individuals, including the Special Assistant to the President for Consumer Affairs, strongly recommended the establishment of minimum meat content standards for labeling purposes in order to protect consumers. There was also general agreement that the two percent minimum meat content standard was reasonable in the accomplishment of that objective.

The Secretary (Pet. App. 9a) and the district court (Pet. App. 42a) noted that more than 90 percent of all poultry soups marketed in the United States under an unqualified label contained more than two percent poultry meat on a ready-to-serve basis. The Secretary also relied upon (Pet. App. 10a) the results of consumer identification tests which had been commissioned by petitioner. In one of these tests, 660 housewives sampled one of petitioner's soup mixes containing less than two percent chicken meat. Of that group 27 percent was unable to identify the product as "chicken soup." In light of this evidence, the finding that it would be misleading to consumers to label soup such as petitioner's as "chicken noodle soup" (rather than "chicken flavored noodle soup") was plainly a permissible exercise of the power conferred upon the Secretary.

Houston v. *St. Louis Packing Co.*, 249 U.S. 479, supports, rather than conflicts with, the decision be-

low. In the *Houston* case, the Secretary of Agriculture, acting under authority similar to that conferred by the PPIA, promulgated a regulation declaring that the addition of water, ice or cereal to sausage, beyond certain specified percentages, would render its labeling as "sausage" false and deceptive. This Court sustained the Secretary's exercise of power and the validity of the regulation. Petitioner contends that the *Houston* decision conflicts with this case because the test applied there was whether substantial evidence supported the regulation; the short answer is that both courts below applied a similar test here. In any event, the appropriateness of the standard was not argued in the *Houston* case, and, we submit, the proper standard today under the Administrative Procedure Act with respect to rule-making of this kind is whether there is a rational foundation for the rule (*i.e.*, that it is not arbitrary, capricious or unlawful). Section 10(e)(B)(1) of the Administrative Procedure Act, 5 U.S.C. 1009(e)(B)(1); *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 145; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 207. That test was obviously satisfied here.

2. The *Houston* case provides clear support for the the Secretary's authority to issue regulations such as those challenged here, notwithstanding the absence of any specific standard-of-identity authority comparable to that conferred on the Food and Drug Administration by the Federal Food, Drug and Cosmetic Act. To be sure, the PPIA gives the Secretary the power to direct any person using a deceptive label to cease using it and provides for an administrative

hearing and judicial review of the Secretary's order. 21 U.S.C. 457(b), pp. 11–12, *infra*. But, as the district court observed (Pet. App. 32a–33a and n. 6), the Act does not state that the remedy specifically provided is exclusive. It is entirely appropriate, we submit, for the Secretary to proceed in this area by rule-making under his general authority to prescribe regulations designed to effectuate the purposes of the Act.

We also note that the availability of the specific remedy detailed in 21 U.S.C. 457(b) may render the present action premature under the analysis outlined in our brief in *Abbott Laboratories* v. *Gardner*, No. 39, this Term, pp. 35–55.[3] The question of prematurity was not, however, argued below, and we do not, therefore, rely on it here.

3. (*a*) There is no substance to the claim that procedural rules were violated by the Department of Agriculture in promulgating these regulations. There was strict compliance with the Administrative Procedure Act, which, with respect to rule-making proceedings, requires only that affected parties be given appropriate notice of contemplated action and an opportunity to submit their views in writing. 5 U.S.C. 1001, 1002, 1003. Indeed, the Secretary went beyond the minimal requirements; an oral public hear-

[3] The *Abbott Laboratories* case and its companion, *Gardner* v. *Toilet Goods Association*, Nos. 336, 438, this Term, concerned interpretive regulations of the Food and Drug Administration, and we also argued in those cases that, irrespective of general "ripeness" principles, the statutory scheme under the Food, Drug and Cosmetic Act particularly foreclosed premature judicial intervention. Hence this case is distinguishable from *Abbott Laboratories* and *Toilet Goods*.

ing was held to afford interested parties an opportunity to express views. 28 Fed. Reg. 11017, 14432.

Morgan v. *United States*, 304 U.S. 1, cited by petitioner (Pet. 18–19), involved a quasi-judicial rate-making proceeding governed by a statute requiring a hearing. No such hearing was required here. And even in *Morgan*, this Court's prime concern was that the parties be made aware of the government's proposals and have an opportunity to rebut them. Petitioner does not—and indeed could not—argue here that it was unaware of the action which the Secretary proposed to take or that it was not offered an opportunity to present its views on this action.

(*b*) The courts below also correctly rejected petitioner's claim (Pet. 19–23) that the Secretary had improperly relied on "confidential" evidence which petitioner was not permitted to refute. Since rule-making was involved, the Secretary was not obliged to furnish petitioner with documents upon which he relied. In fact, in this case the Secretary made available to petitioner, after the commencement of this action, all of the matter which formed the basis of his decision, with the exception of certain privileged documents. Upon its *in camera* examination of the entire administrative file, the district court upheld the Secretary's conclusion that the privileged documents should not be made available.

(*c*) Nor is there substance to petitioner's assertion (Pet. 21–23), that the Secretary submitted a "tailored" administrative record to the district court. Every relevant document—including all of the evi-

dence tending to support petitioner's position that the standard of identity was unwarranted—was furnished to the district court. Petitioner made the same allegation of bad faith in both courts below; neither deemed it of sufficient substance to warrant discussion.

(*d*) The challenged regulations were actually issued by respondent Grange, Deputy Administrator, Agricultural Marketing Services, under authority delegated by the Secretary. 22 Fed. Reg. 7108, 29 Fed. Reg. 3114. Petitioner's assertion (Pet. 15–16) that Grange failed to exercise his independent judgment in promulgating the regulations is without merit. The Administrator recited, in the Statement of Considerations which accompanied the amendments, that "[c]onsideration has been given to all data, views and arguments presented at the hearing or in writing pursuant to the notice of rule-making and to all other relevant information available in the Department of Agriculture." It is well established that courts will not allow "the Administrator's recitation that he has personally examined [the record] in making his decision to be successfully challenged by a mere allegation in a brief." *Willapoint Oysters* v. *Ewing,* 174 F. 2d 676, 696 (C.A. 9), certiorari denied, 338 U.S. 860.

4. Petitioner also contends (Pet. 16–18) that the rule of *Securities and Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194, was violated because the district court sustained the regulations on the theory that the Secretary had "general legislative power"

and not on the Secretary's finding that the regulations were needed to protect consumers against deception. The claim is refuted by the district court's opinion which refers at several points to the regulations as based upon the Secretary's power to determine when labeling "is deemed to be deceptive" (Pet. App. 33a; see Pet. App. 34a, 36a–37a). Indeed, in relating the evidence in the record which supported the Secretary's decision, the district court emphasized the proof relating to deception of consumers and the testimony of the Special Assistant to the President for Consumer Affairs. There was obviously no failure on the part of the district court to realize that the Secretary was acting under his authority to protect consumers against false and misleading labeling.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1967.

APPENDIX

1. The Poultry Products Inspection Act, 71 Stat. 441, 21 U.S.C. 451 *et seq.*, provides in relevant part as follows:

> 21 U.S.C. 453:
>
> (e) The term "poultry product" means any poultry which has been slaughtered for human food from which the blood, feathers, feet, head, and viscera have been removed in accordance with rules and regulations promulgated by the Secretary, any edible part of poultry, or, unless exempted by the Secretary, any human food product consisting of any edible part of poultry separately or in combination with other ingredients.
>
> * * * * *
>
> 21 U.S.C. 457:
>
> (b) *False or misleading labeling.* The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this chapter or the container thereof which is false or misleading in any particular is prohibited. No poultry products inspected or required to be inspected pursuant to the provisions of this chapter shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary are permitted. If the Secretary has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the

label be withheld unless it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Secretary, he may request a hearing, but the use of the label shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless within thirty days after the receipt of notice of such final determination the person adversely affected thereby appeals to the United States court of appeals for the circuit in which he has his principal place of business or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 194 of Title 7 shall be applicable to appeals taken under this section.

21 U.S.C. 458:

The following acts or the causing thereof are prohibited:

(d) Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product.

21 U.S.C. 461:

(a) Any person who violates the provisions of section 458, 459, 460, or 466 of this title, shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than six months, or a fine of not more than $3,000, or both such imprisonment and fine; but if such violation is committed after one conviction of such person under this section has become final such person shall be subject to imprisonment for not more than one year, or a fine of not more than $5,000, or both such imprisonment and fine; but if such violation is committed after two or more convictions of such person under this section have become final such person shall be subject to imprisonment for not more than two years, or a fine of

not more than $10,000, or both such imprisonment and fine. When construing or enforcing the provisions of said sections the act, omission, or failure of any person acting for or employed by any individual, partnership, corporation, or association within the scope of his employment or office shall in every case be deemed the act, omission, or failure of such individual, partnership, corporation, or association, as well as of such person.

21 U.S.C. 463:

The Secretary shall promulgate such rules and regulations as are necessary to carry out the provisions of this chapter.

21 U.S.C. 464:

(a) The Secretary shall, by regulation and under such conditions as to sanitary standards, practices, and procedures as he may prescribe, exempt from specific provisions of this chapter—

* * * * *

(3) for such period of time as the Secretary determines that it would be impracticable to provide inspection and the exemption will aid in the effective administration of this chapter, any person engaged in the processing of poultry or poultry products for commerce and the poultry or poultry products processed by such person: *Provided, however,* That no such exemption shall continue in effect on and after July 1, 1960; and * * * *

21 U.S.C. 467:

(a) For the purpose of preventing and eliminating burdens on commerce in poultry and poultry products, the jurisdiction of the Secretary within the scope of this chapter shall be exclusive and poultry and poultry products shall be exempt from the provisions of the Federal Foods, Drug, and Cosmetic Act, as amended, to the extent of the application or the extension thereto of the provisions of this chapter.

(b) In carrying out the provisions of this chapter, the Secretary may cooperate with other branches of Government and with State agencies and may conduct such examinations, investigations, and inspections as he determines practicable through any officer or employee of a State commissioned by the Secretary for such purpose.

2. The Administrative Procedure Act, 5 U.S.C. 1001 *et seq.* (1964 ed.[18]), provides in relevant part as follows:

5 U.S.C. 1001:

(c) "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

5 U.S.C. 1003:

(a) General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

[18] The Administrative Procedure Act was codified in September, 1966, as 5 U.S.C. 501 *et seq.* For convenience the old section numbers are used here.

Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

5 U.S.C. 1009

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the require-

ments of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statutes; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

3. The Regulations of the Secretary of Agriculture provide in relevant part as follows:

7 C.F.R. 81.134 Product specifications for labeling purposes.

(a) *Authorization to establish specifications.* The Administrator is authorized to establish specifications covering the principal constituents of any poultry food product with respect to which a specified name of the product or other labeling terminology may be used, whenever such action is necessary to prevent sale of the product under a false or deceptive name or other false or misleading labeling. The requirements of this section are hereby found to be necessary for this purpose.

* * * * *

(c)(6)(i) Poultry dishes and specialty items listed in Table IV of this paragraph shall meet the requirements set forth in said Table, irrespective of the type of packaging, and the percentages in Table IV shall be calculated on a ready-to-serve basis * * *. Products similar to those listed in Table IV, but having less than the specified minimum poultry meat content, may use the "Kind" name in the product name, provided it is appropriately qualified to distinguish such products from those containing the specified minimum meat content.

(c)(6)(ii) Products of the types specified in §§ 81.208(a) and (b) will be deemed to have false, deceptive or misleading labeling if they use the "Kind" name of the poultry (chicken,

turkey, etc.) in the product name without appropriate qualification. For example, a consumer packaged noodle soup product containing less than 2 percent chicken meat on a ready-to-serve basis may not be labeled as "Chicken Noodle Soup" but, when appropriate, could be labeled as "Chicken Flavored Noodle Soup."

TABLE IV

Product name	Minimum percent cooked deboned poultry meat of kind indicated	Minimum percent cooked poultry of kind indicated, including bone
(Kind) Ravioli	2	
(Kind) Soup	2	
* * *	*	*

7 C.F.R. 81.208:

* * * * *

(a) Any human food product (in a consumer package) not provided for in paragraph (c) of this section, if: (1) It contains less than 2 percent cooked poultry meat (deboned white or dark poultry meat, or both); (2) it contains less than ten percent of cooked poultry skins, giblets, or fat, separately, and less than ten percent of cooked poultry skins, giblets, fat, and meat (deboned white or dark poultry meat or both) in any combination; (3) the poultry ingredients used in the product were prepared under inspection as defined in § 81.1, or were inspected under a substantially equivalent foreign inspection system and imported in compliance with the Act and the regulations; (4) the immediate container of the product bears a label which shows the name of the product, a statement of the ingredients in the product, including a declaration as to artificial flavors, colors, or preservatives, if any, the net weight or other appropriate measure of the contents, and the name and address of the person preparing or distributing the product; and (5) the product does not in any respect have a false

or misleading label. (See § 81.134 with respect to labeling.) The aforesaid percentages of ingredients shall be computed on the basis of the moist, deboned, cooked poultry in the ready-to-serve product when prepared according to the serving directions on the consumer package.

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